No. 94-5707

Supreme Court, U.S.
FILED
JAN 11 1995
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

SHARLENE WILSON,

Petitioner,

—v.—

STATE OF ARKANSAS,

Respondent.

ON WRIT OF *CERTIORARI*
TO THE ARKANSAS SUPREME COURT

BRIEF *AMICUS CURIAE* OF THE AMERICAN CIVIL LIBERTIES UNION, THE ACLU OF ARKANSAS, AND THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS, IN SUPPORT OF PETITIONER

Tracey Maclin
(*Counsel of Record*)
Boston University School of Law
765 Commonwealth Avenue
Boston, Massachusetts 02215
(617) 353-4688

Steven R. Shapiro
American Civil Liberties Union Foundation
132 West 43 Street
New York, New York 10036
(212) 944-9800

Ephraim Margolin
240 Stockton Street
San Francisco, California 94108
(415) 421-4347

BEST AVAILABLE COPY

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

INTEREST OF *AMICI* 1

STATEMENT OF THE CASE 2

SUMMARY OF ARGUMENT 3

ARGUMENT 5

I. UNDER THE COMMON LAW, A GOVERNMENTAL OFFICER WAS REQUIRED TO REQUEST ADMITTANCE AND BE REFUSED ENTRY BEFORE FORCING OPEN THE DOORS OF A HOME 5

II. THE COURT'S PRIOR RULINGS REJECT THE VIEW THAT OFFICERS ARE FREE FROM CONSTITUTIONAL STANDARDS TO DECIDE HOW THEY WILL EXECUTE AN INTRUSION INTO A HOME 13

A. *Ker* Establishes That Forcible Police Entries Into A Home Are Governed By The Reasonableness Clause Of The Fourth Amendment 13

B. Prior Rulings Establish That Police Do Not Have Unchecked Discretion To Decide How To Enter Or Invade A Home 14

Page

III. UNDER THE FOURTH AMENDMENT'S REASONABLENESS CLAUSE, THIS COURT HAS EVALUATED THE MANNER OR METHOD OF HOW A SEARCH AND SEIZURE IS EXECUTED 18

IV. THE ANNOUNCEMENT RULE PROMOTES THE PRIVACY AND SECURITY INTERESTS OF A HOMEOWNER, INTERESTS WHICH HAVE BEEN RECOGNIZED BY THE COURT'S FOURTH AMENDMENT CASES 23

This Case Should Not Be Used To Determine The Type and Scope Of Exceptions To The Announcement Requirement ... 28

CONCLUSION 30

APPENDICES
Appendix A 1a
Appendix B 1b

TABLE OF AUTHORITIES

Page

Cases

Arizona v. Hicks,
480 U.S. 321 (1987) 16

Arizona v. Mincey,
437 U.S. 385 (1978) 15, 29

Bell v. Clapp,
10 Johns.R. 263 (N.Y.Sup.Ct. 1813) 12

California v. Hodari D.,
499 U.S. 621 (1991) 5

Camara v. Municipal Court,
387 U.S. 523 (1967) 4, 22, 23

Case of Richard Curtis,
168 Eng.Rep. 67 (K.B. 1757) 7

Chimel v. California,
395 U.S. 752 (1969) 4, 19, 20

Chipman v. Bates,
15 Vt. 51 (1843) 7

County of Riverside v. McLaughlin,
500 U.S. 44 (1991) 6

Dalia v. United States,
441 U.S. 238 (1979) 21

Florida v. Bostick,
501 U.S. 429 (1991) 24

Kelsy v. Wright,
1 Root 83 (Conn. 1783) 12

Page

Ker v. California,
374 U.S. 23 (1963) . . . . . *passim*

Maryland v. Buie,
494 U.S. 325 (1990) 15, 20, 29

Maryland v. Garrison,
480 U.S. 79 (1987) 4, 18, 19, 20

Michigan v. Clifford,
464 U.S. 287 (1984) 22

Michigan v. Tyler,
436 U.S. 499 (1978) 22

Miller v. United States,
357 U.S. 301 (1958) 17, 23

Minnesota v. Dickerson,
508 U.S. __, 113 S.Ct. 2130 (1993) 6

Minnesota v. Olson,
495 U.S. 91 (1990) 28

Payton v. New York,
445 U.S. 573 (1980) 12, 13, 15, 16, 21, 28

People v. Gastelo,
432 P.2d 706 (1967) 29

Sabbath v. United States,
391 U.S. 585 (1968) 23

Semanye's Case,
77 Eng.Rep. 194 (K.B. 1603) 4, 6-8

State v. Shaw,
1 Root 134 (Conn. 1789) 12

State v. Smith,
181 A.2d 761 (N.J. 1962) 24

Page

Steagald v. United States,
451 U.S. 204 (1981) 13

Tennessee v. Garner,
471 U.S. 1 (1985) 4, 5, 13, 18, 20

Terry v. Ohio,
392 U.S. 1 (1968) 29

Thompson v. Louisiana,
469 U.S. 17 (1984) 15

United States v. Watson,
423 U.S. 411 (1976) 5, 6

Warden v. Hayden,
387 U.S. 294 (1967) 28

Welsh v. Wisconsin,
466 U.S. 740 (1984) 16

Ybarra v. Illinois,
444 U.S. 85 (1979) 16

Statutes, Rules and Regulations

"An Act for laying an Excise on
sundry Articles of Consumption
within this State," Ct.St.,
1783, Jan. sess., Acts and Laws,
1783, Jan sess., 622 10

18 U.S.C. §3109 17

Ark. Code Ann. §16-81-107 (c) 17

Ark.R.Crim.P. 13.3(e) 3

Mass. Acts And Laws, 1782-83, at 86-87 9

Page

Mass. Resolve 1776-77,
ch. 1176 (May 7, 1777) 9

N.J. St., 6th Gen. Assemb.,
2d Sitting, ch. XXXII, §18
(June 24, 1782) 10

N.Y. St. sess. 5, ch. 39, §3
(April 13, 1782), N.Y. State Laws,
vol.1 (1777-84), p.480 9

Pa.Stats. ch. CXC, §10 (1780) 10

U.S. Stat., 1st Cong., Sess. III,
ch. 15, §29 (March 3, 1791) 10

Legislative History

120 Cong. Rec. 22884
(July 11, 1974) 24, 25, 26

Other Authorities

60 Minutes (CBS News,
Mar. 28, 1993) 27

Blakey, G. Robert, "The Rule
of Announcement and Unlawful
Entry: *Miller v. United States*
and *Ker v. California*,"
112 U.Pa.L.Rev. 499 (1964) 8, 12, 14, 24

Bovard, James, LOST RIGHTS (1994) 26, 27

Burn, Richard, 1 THE JUSTICE OF
THE PEACE AND PARISH OFFICER
(*circa* 1770) 11

Page

Chitty, Joseph, 1 THE CRIMINAL LAW
(1836) 11

CONDUCTOR GENERALIS (June 15, 1801) 10, 11

Cuddihy, William, The Fourth
Amendment: Origins and original
meaning (1990)(unpublished Ph.D.
dissertation, Claremont
Graduate School) 9

Dalton, Michael,
COUNTREY JUSTICE (1619) 8

Garcia, Charles Patrick, Note,
"The Knock and Announce Rule: A
New Approach to the Destruction-
of-Evidence Exception,"
93 Colum.L.Rev. 685 (1993) 14, 23, 26

Hale, Sir Matthew,
1 PLEAS OF THE CROWN (1736) 7

Hale, Sir Matthew,
2 PLEAS OF THE CROWN (1736) 7, 8

Hawkins, William,
2 PLEAS OF THE CROWN (1777) 7, 8, 10, 11

LaFave, Wayne R.,
2 SEARCH AND SEIZURE (2d ed. 1987) 23, 29

Lasson, Nelson B., THE HISTORY
AND DEVELOPMENT OF THE FOURTH
AMENDMENT TO THE UNITED STATES
CONSTITUTION (1937) 7

Note, "Announcement in Police
Entries," 80 Yale L.Rev. 139 (1970) 12, 23

Page

Sheppard, William, THE OFFICERS OF CONSTABLES (1650) 8

Sonnenreich, Michael R., & Ebner, Stanley, "No-Knock and Nonsense, An Alleged Constitutional Problem," 44 St. John's L.Rev. 626 (1970) 14, 24, 27

Taylor, Telford, TWO STUDIES IN CONSTITUTIONAL INTERPRETATION (1969) 8

Wilgus, Horace L., "Arrest Without a Warrant," 22 Mich.L.Rev. 798 (1924) 8

INTEREST OF *AMICI* [1]

The American Civil Liberties Union (ACLU) is a nationwide, nonprofit, nonpartisan organization with nearly 300,000 members dedicated to the principles of liberty and equality embodied in the Bill of Rights. The ACLU of Arkansas is one of it statewide affiliates. Since its founding in 1920, the ACLU has frequently appeared before this Court, both as direct counsel and as *amicus curiae*. In particular, the ACLU has participated in many cases involving the Fourth Amendment. Because this case addresses an important Fourth Amendment question, its proper resolution is a matter of significant concern to the ACLU and its members.

The National Association of Criminal Defense Lawyers (NACDL) is a nonprofit voluntary association of criminal defense lawyers founded in 1958 with its office in Washington, D.C. The American Bar Association recognizes NACDL as an affiliate organization, and NACDL has full representation on the ABA House of Delegates. Among its purposes and missions stated in its bylaws are "to promote the proper administration of justice," "to ensure justice and due process for persons accused of crime," and to promote "continued recognition and adherence to the Bill of Rights [which is] necessary to sustain the quality of the American system of justice."

NACDL has over 8,100 lawyer members in all 50 states and the District of Columbia, Puerto Rico, Virgin Islands, Guam, the Commonwealth of the Northern Mariana Islands, Canada, and Australia. NACDL has 65 state and local affiliates from Hawaii to Florida and even in Canada and approximately 31,000 affiliate lawyer members.

---

[1] Letters of consent to the filing of this brief have been lodged with the Clerk of the Court pursuant to Rule 37.3.

STATEMENT OF THE CASE

On December 31, 1992, Arkansas law enforcement officers executed a search warrant to look for illegal narcotics and a small caliber handgun at the home of the petitioner, Sharlene Wilson. According to the testimony at the suppression hearing, when the police arrived at petitioner's home, petitioner, her son, petitioner's soon-to-be husband, and two friends were inside the house. *See* J.A. 62-63. Officer Henry Efird, who had obtained the search warrant, admitted that he heard no officer announce their presence, knock on the door of petitioner's home, or state their purpose for being there. J.A. 40.

Officer Roger Walls testified that he "was either [the] first or second" officer who entered petitioner's home. J.A. 40. Officer Walls stated that when the search team arrived at petitioner's home it "was late evening," although he could not recall the exact time or whether it was already dark. J.A. 41. Officer Walls testified that the "prime door" was open, but a screen door was shut. Officer Walls testified that he and another officer "identified ourselves as police officers and told them [the occupants of petitioner's home] we had a search warrant and entered while we were doing that." J.A. 41.

No testimony indicated that petitioner or anyone inside was given an opportunity to admit the police into petitioner's home. Moreover, no testimony revealed that the police had any reason to believe when they approached petitioner's home either that petitioner or anyone else in the home might destroy evidence, or that the occupants of the home represented a threat to the safety of the officers.

The search of the home disclosed, *inter alia*, evidence of drug possession and a small caliber handgun. J.A. 53. The trial court denied petitioner's motion to suppress the evidence due to the failure of the officers to announce their

presence and purpose before entering petitioner's home. J.A. 45. On appeal, the Arkansas Supreme Court concluded that "[t]he testimony indicated that the officers entered the home while they were identifying themselves." J.A. 77. There is no indication from that court that exigent circumstances justified an immediate police entrance into petitioner's home. The court ruled that the officers had followed Rule 13.3(e) of the Arkansas Rules of Criminal Procedure, which does not require that officers announce their presence and purpose in the execution of a search warrant.[2]

On appeal, the Arkansas Supreme Court dismissed petitioner's claim that the Constitution requires officers to announce their presence and purpose before forcibly entering a home. The court ruled: "There is no authority for Ms. Wilson's theory that the knock and announce principle is required by the Fourth Amendment." J.A. 77.

In this Court, petitioner argues that the Fourth Amendment requires police officers to announce their presence and purpose before they forcibly enter a private home.

SUMMARY OF ARGUMENT

When assessing the reasonableness of a challenged police practice, this Court often considers common law principles. Under the common law, a governmental officer was required to announce his authority and purpose before breaking open the doors of a home. The origins of the an-

---

[2] Ark.R.Crim.P. 13.3(e), in pertinent part, provides:

> The executing officer, and other officers accompanying and assisting him, may use such degree of force, short of deadly force, against persons, or to effect entry or to open containers as is reasonably necessary for the successful execution of the search warrant with all practicable safety . . . .

nouncement rule have been traced back to *dicta* from the seventeenth century. *Semanye's Case*, 77 Eng.Rep. 194, 195 (K.B. 1603). That *dicta*, however, subsequently received the approval of many British and American legal authorities. Today, the announcement requirement stands as a fundamental right that is an essential component of the privacy surrounding the home.

In concluding that the announcement requirement is not compelled by the Fourth Amendment, the court below ignored this Court's many rulings which have rejected the position that the Constitution has nothing to say about how police officers execute an intrusion of a home. While there was no definitive opinion in *Ker v. California*, 374 U.S. 23 (1963), eight Justices agreed that police entries into a home must withstand scrutiny under the Reasonableness Clause of the Fourth Amendment. No Justice in *Ker* supported the notion that officers are free from constitutional restraints to force open doors whenever they possess a warrant or probable cause to enter. Rulings since *Ker* establish that police do not have unchecked discretion to decide how to enter or invade a home.

Furthermore, under the Reasonableness Clause of the Fourth Amendment, the Court has evaluated the manner in which a search and seizure is executed. Prior precedents, including *Maryland v. Garrison*, 480 U.S. 79 (1987); *Tennessee v. Garner*, 471 U.S. 1 (1985); and *Chimel v. California*, 395 U.S. 752 (1969), establish that the manner in which a particular intrusion is carried out -- even one authorized by a warrant or valid exception to the warrant rule -- must satisfy the reasonableness test of the Fourth Amendment. No ruling of this Court supports the broad discretionary powers sanctioned by the court below. Indeed, in *Camara v. Municipal Court*, 387 U.S. 523, 532 (1967) -- which involved an entry *substantially less* intrusive than the entry of petitioner's home -- this Court recognized that a

homeowner has constitutional interests in being notified of an official's presence and the lawful limits of that official's authority to enter and search.

Finally, the announcement rule advances compelling privacy and security interests of a homeowner. Those who criticize the rule take a position that is not consistent with the reasoning of this Court's cases. Likewise, those who malign the announcement rule are wrong when they declare this safeguard only benefits the guilty. This Court and the United States Congress, among others, have rejected this judgment. The notification requirement is a protection the Fourth Amendment affords to *all* persons.

ARGUMENT

I. UNDER THE COMMON LAW, A GOVERNMENTAL OFFICER WAS REQUIRED TO REQUEST ADMITTANCE AND BE REFUSED ENTRY BEFORE FORCING OPEN THE DOORS OF A HOME

In resolving Fourth Amendment questions, the Court often considers common law principles when evaluating the reasonableness of a challenged police practice. Members of the Court have been reluctant to invalidate searches and seizures approved by the common law and followed in American jurisdictions when the Fourth Amendment was ratified.[3] But fidelity to the common law cuts both ways. If the imprimatur of the common law is an important factor when the Court sanctions certain governmental intrusions,

---

[3] *See, e.g., California v. Hodari D.*, 499 U.S. 621, 624-25 (1991); *Tennessee v. Garner*, 471 U.S. at 26 (O'Connor, J., dissenting); *United States v. Watson*, 423 U.S. 411, 418-21 (1976).

see United States v. Watson, 423 U.S. at 428-29 (Powell, J., concurring),[4] then the Court owes equal respect to common law rules that proscribed governmental intrusions that violated the privacy and security of the individual.

After all, if one of the purposes of the Fourth Amendment is to "preserve that degree of respect for the privacy of persons and the inviolability of their property that existed" in 1791, *Minnesota v. Dickerson*, 508 U.S. __, 113 S.Ct. 2130, 2139 (1993)(Scalia, J., concurring), then the Court must be evenhanded in its reliance on the common law when determining what is reasonable under the Fourth Amendment. The Court should reject arguments that eliminate or narrow a constitutional freedom that was protected when the Fourth Amendment was proposed and "has been generally adhered to by the traditions of our society ever since." *County of Riverside v. McLaughlin*, 500 U.S. 44, 66 (1991)(Scalia, J., dissenting). The right to be free from an unannounced, forcible entry into one's home undoubtedly is such a freedom.

The seeds for what is known as the knock and announce rule were first planted in the seventeenth century. In *dicta*, the court in *Semanye's Case* stated:

> In all cases when the King is party, the sheriff (if the doors be not open) may break the party's house, either to arrest him, or to do other execution of the King's process, if otherwise he cannot enter. But before he breaks it, he ought to signify the cause of his coming, and make request to open doors.[5]

In a 1757 criminal case, the announcement rule was again addressed by the English judiciary. In the *Case of Richard Curtis*, the court restated the formula articulated in *Semanye's Case* and unanimously ruled that peace officers executing an arrest warrant for a breach of the peace "may break open doors, after having demanded admittance and given due notice of their warrant."[6]

The requirement that an officer announce his presence and purpose before breaking open doors also received the approbation of respected English legal commentators. Regarding arrest warrants, Hale wrote: "If it be a warrant for felony, or a warrant for the surety of the peace, the officer may break open the door, if he be sure the offender is there, if after acquainting them of the business, and demanding the prisoner, he refuses to open the door."[7] Hawkins also recognized the requirement of announcement as a precondition

---

[4] In *Watson*, Justice Powell noted that logic "would seem to dictate that arrests be subject to the warrant requirement at least to the same extent as searches." *Id.* at 429. In the end, however, Justice Powell concluded that "logic sometimes must defer to history and experience." *Id.*

[5] 77 Eng.Rep. at 195. *Semanye's Case* involved a sheriff's execution of a civil writ of attachment.

[6] 168 Eng.Rep. 67, 68 (K.B. 1757).

[7] 1 Sir Matthew Hale, PLEAS OF THE CROWN 582 (1736); *see also* 2 Hale, PLEAS OF THE CROWN 90 (1736)("[A constable] may break open doors to take the felon, if the felon be in the house, and his entry denied after demand and notice that he is constable"); *id.* at 102 ("If the person pursued by *hue* and *cry* be in a house, and the doors are shut, and refused to be opened, upon demand of the constable, and notification of his business, he may break open the doors"); *id.* at 103 (Upon the hue and cry, officers may search suspected houses for felons, "but it must be always remembered, that in case of breaking open a door, there must be first a notice given to them within of his business, and a demand of entrance, and a refusal before doors can be broken"). Hale's scholarship was considered "the settled doctrine[] of the common law." *Chipman v. Bates*, 15 Vt. 51, 60 (1843); *see also* Nelson B. Lasson, THE HISTORY AND DEVELOPMENT OF THE FOURTH AMENDMENT TO THE UNITED STATES CONSTITUTION 35 (1937).

to a forcible entry. Officers could break open doors to effectuate an arrest, but Hawkins stated "that the law doth never allow of such Extremities but in Cases of Necessity; and therefore, That no one can justify the breaking open another's Doors to make an Arrest, unless he first signify to those in the House the Cause of his coming, and request them to give him Admittance."[8]

The requirement of notification and purpose also applied to search warrants. According to Hale, "[i]f the door be shut, and upon demand it be refused to be opened by them within, if the stolen goods be in the house, the officer may break open the door."[9]

The knock and announce rule declared in *Semanye's Case* "was widely followed in early American decisions."[10]

---

[8] 2 William Hawkins, PLEAS OF THE CROWN 86 (ch. XIV)(1777); *see also* William Sheppard, THE OFFICERS OF CONSTABLES, ch.8, §2, no. 4 (1650), quoted in Telford Taylor, TWO STUDIES IN CONSTITUTIONAL INTERPRETATION 28-29 (1969)("For it is the chief part of their office to represse fellony, and albeit it be a man's house he doth dwell in, which they doe suspect the fellon to be in, yet they may enter in there to search; and if the owner of the house, upon request, will not open his dores, it seems the officer may break open the dores upon him to come in to search").

[9] 2 Hale, PLEAS OF THE CROWN at 150-51. *See also* Michael Dalton, COUNTREY JUSTICE 187 (1619)(An "officer, before he break open the house or doores of any person, he must first signify the cause of his comming, & desire that the doores may be opened unto him").

[10] G. Robert Blakey, "The Rule of Announcement and Unlawful Entry: *Miller v. United States* and *Ker v. California*," 112 U.Pa.L.Rev. 499, 504 (1964)(citing cases). *See also* Horace L. Wilgus, "Arrest Without a Warrant," 22 Mich.L.Rev. 798, 802-03 (1924)("Before doors are broken, there must be a necessity for so doing, and notice of the authority and purpose to make the arrest must be given and a demand and refusal of admission must be made, unless this is already understood, or the peril would be increased")(footnotes omitted).

Moreover, the fundamental nature of the right to notification before forcible entry is demonstrated by the laws found in many of the States that ratified the Fourth Amendment. As one historian has noted, "[t]he statutes and legal manuals of at least seven states permitted forcible entry only after a householder had refused to admit a searcher under circumstances that included smuggling, counterfeiting, and trading with the enemy."[11] For example, in 1777 Massachusetts sanctioned forcible entry and search of a home where an officer "after *demanding* of the Owner of such House . . . and if the owner of the same, or the person in his absence found therein shall not open the same immediately."[12] A 1782 Massachusetts law governing the issuance of search warrants to discover contraband permitted forcible entry "if Admittance be *refused* or cannot be obtained."[13]

On April 13, 1782, New York passed a law that allowed constables possessing search warrants "to break open the doors of any house or outhouse, for the purpose of making any [contraband] search, if *admittance* shall be refused."[14] Similarly both New Jersey and Pennsylvania permitted officers to undertake forcible entries where a homeowner had opposed or refused a previous demand for admit-

---

[11] William Cuddihy, The Fourth Amendment: Origins and original meaning, 602-1791, at 1512 (1990)(unpublished Ph.D. dissertation, Claremont Graduate School)(footnote omitted)(citing statutes of Massachusetts; Connecticut; New York; New Jersey; South Carolina; and Georgia).

[12] Mass. Resolve 1776-77, ch. 1176 (May 7, 1777)(emphasis added).

[13] Mass. Acts And Laws, 1782-83, at 86-87 (emphasis added).

[14] N.Y. St. sess. 5, ch. 39, §3 (April 13, 1782), N.Y. State Laws, vol.1 (1777-84), p.480 (emphasis added).

tance.[15] Under Connecticut law, state collectors could "enter any Store or Place for the execution of his said Office, as shall be needful, after making *Demand* at the Door of Entrance, and refusal or neglect to grant the same, in the Day Time."[16] Finally, on March 3, 1791, Congress enacted a provision concerning the importation of distilled spirits that provided: "That it shall be lawful for the officers of inspection of each survey at all times in the daytime, *upon request*, to enter into all and every the houses, store-house, ware-houses, buildings and places which shall have been entered in manner aforesaid, and by tasting, gauging or otherwise, to take account of the quantity, kinds and proofs of the said spirits therein contained." U.S. Stat., 1st Cong., Sess. III, ch. 15, §29 (March 3, 1791)(emphasis added).

The announcement rule was also recognized in the legal manuals read by early American jurists and lawyers. CONDUCTOR GENERALIS (June 15, 1801), a popular treatise among American justices of the peace, citing Hawkins, explained that notification of purpose was necessary to break open doors to apprehend a felon.[17] Announcement was

---

[15] *See* N.J. St., 6th Gen. Assemb., 2d Sitting, ch. XXXII, §18 (June 24, 1782)(search warrants may be granted officers "and in case of Refusal to permit such Search, or if Opposition be made thereto, [officers may] break open Doors and Locks for the Purpose aforesaid"); Pa.Stats. ch. CXC, §10 (1780)("And in case of refusal or opposition, [naval officers possessing a writ of assistance] . . . shall break open doors, and remove obstacles, and do and perform every and all other things, which by this Act he is authorized to do").

[16] "An Act for laying an Excise on sundry Articles of Consumption within this State," Ct.St., 1783, Jan. sess., Acts and Laws, 1783, Jan sess., 622 (emphasis added).

[17] In the chapter entitled "Arrest," CONDUCTOR explained: "As to the case, of breaking open doors, in order to apprehend offenders, it is to be observed, that the law doth never allow of such extremities but in cases (continued...)

similarly required to execute search warrants in a forcible manner.[18] Other legal manuals of this era reaffirmed the need for announcement in the execution of arrest and search warrants.[19]

---

[17] (...continued)
of necessity; and therefore, that no one can justify the breaking open of another's door to make an arrest, unless he first signify to those in the house the cause of his coming, and them to give him admittance."

[18] In the chapter entitled "Search Warrants," CONDUCTOR explained: "Whether the stolen goods are in the suspected house or not, the officer and his assistants in the day time may enter, the doors being open, to make search, and it is justifiable by this warrant. If the door be shut, and upon demand it be refused to be opened, by them within, if the stolen goods be in the house, the officer may break open the door."

In the chapter entitled "Surety For The Peace," CONDUCTOR explained how a peace warrant shall be executed: "It seems generally agreed, that where a person authorised by warrant of a justice of the peace, to compel a man who is sheltered in an house, to find sureties for the peace or good behavior, is denied quietly to enter into it, he may justify breaking open the doors in order to take him; but he must first signify to those in the house the cause of his coming, and request them to give him admittance."

[19] *See* 1 Richard Burn, THE JUSTICE OF THE PEACE AND PARISH OFFICER 98 (*circa* 1770)(repeating Hawkins' statement that forcible entry only permitted after officer "first signify to those in the house the cause of his coming, and request them to give him admittance"); 1 Joseph Chitty, THE CRIMINAL LAW (1836), ch. II, at 52-53 ("But when *it is certain* that a treason or felony has been committed, or a dangerous wound given, and the offender being pursued, take refuge in his own house, either a constable or private individual, without distinction, may without any warrant break open his doors after proper demand of admittance"); *id.* at 65-66 ("With respect to the mode of executing [a search] warrant, if the door be shut, and upon demand, not opened, it may be broken open, and so may boxes, after the keys have been demanded, and though the goods be not found, the officer will be excused").

These statutes and the legal manuals consulted by early American justices of the peace -- the same judges responsible for issuing the bulk of the search and arrest warrants during this era -- provide convincing evidence that announcement was a precondition if an officer sought to break open the doors of a home. The absence of cases declaring "illegal an arrest on the grounds of inadequate notice"[20] does not undermine the fundamental status of the announcement rule under the common law. In most of the American cases, courts were not required to address the notice rule because officers typically announced their purpose and entry was denied.[21] As Justice White has already recognized, the common law imposed "carefully crafted restrictions" on officers forcibly entering a home, one of which was that "officers were required to announce their presence, demand admission, and be refused entry before they were entitled to break doors."[22]

---

[20] Blakey, *supra* note 10 at 506.

[21] *See, e.g., State v. Shaw*, 1 Root 134 (Conn. 1789)(warrant for treason); *Kelsy v. Wright*, 1 Root 83 (Conn. 1783)(warrant for lewd conduct); *Bell v. Clapp*, 10 Johns. R. 263 (N.Y.Sup.Ct. 1813)(affirming the right of the officer, who gave proper notice, to conduct forcible entry to execute search warrant). As one commentator has noted, even the dreaded writs of assistance permitted forcible search only where customs officers faced resistance to their authority. *See* Note, "Announcement in Police Entries," 80 Yale L.Rev. 139, 144-45 (1970).

[22] *Payton v. New York*, 445 U.S. 573, 616 (1980)(White, J., dissenting)(footnote omitted). Even Professor Blakey, who is critical of some of the broad language in the Court's earlier cases, does not contest the common law origins of the announcement rule, *see* Blakey, *supra* note 10 at 545, n.337 & 554.

II. THE COURT'S PRIOR RULINGS REJECT THE VIEW THAT OFFICERS ARE FREE FROM CONSTITUTIONAL STANDARDS TO DECIDE HOW THEY WILL EXECUTE AN INTRUSION INTO A HOME

While the above discussion demonstrates that the common law required an officer to announce his presence and purpose before forcibly entering a home, this Court has not blindly followed common law traditions when resolving Fourth Amendment issues. *Garner*, 471 U.S. at 6; *Steagald v. United States*, 451 U.S. 204, 217 (1981); *Payton v. New York*, 445 U.S. 573, 591, n.33 (1980). But the ruling below is not only unsupported by common law principles, it also conflicts with this Court's precedents. Prior rulings have rejected the view sanctioned by the court below that the Constitution has nothing to say about how police officers execute a search of a home.

A. *Ker* Establishes That Forcible Police Entries Into A Home Are Governed By The Reasonableness Clause Of The Fourth Amendment

Although there was no authoritative opinion for the Court in *Ker v. California*, 374 U.S. 23, Justice Clark's plurality opinion does not support the position that officers are free to make an unannounced, forcible entry whenever they possess probable cause for a search. Justice Clark upheld the unannounced entry in *Ker* due to the exigent circumstances of the case.[23] The *Ker* plurality, furthermore, did

---

[23] 374 U.S. at 40 ("Here justification for the officers' failure to give notice is uniquely present. In addition to the officers' belief that Ker was in possession of narcotics, which could be quickly and easily destroyed, Ker's furtive conduct in eluding them shortly before the arrest was ground for the belief that he might well have been expecting the police")(footnote omitted).

not question the constitutional status of the announcement requirement. And the four other Justices who comprised Justice Brennan's dissenting opinion were emphatic that the notice rule was firmly rooted in the protection provided by the Fourth Amendment.[24]

Most importantly, the *Ker* plurality did not suggest that officers are free from constitutional restraints to force open the doors of a home whenever they possess a warrant or probable cause to enter. On the contrary, the *Ker* plurality concluded that the particular entry at issue satisfied the standards of the Fourth Amendment's Reasonableness Clause.[25]

B. Prior Rulings Establish That Police Do Not Have Unchecked Discretion To Decide How To Enter Or Invade A Home

The privacy and security of the home has received the most scrupulous protection under this Court's rulings. A long line of cases have rejected claims that officers possess

---

[24] 374 U.S. at 47-59 (opinion of Justice Brennan). Even critics of a broad knock and announce rule concede that after *Ker*, the announcement rule is required by the Fourth Amendment. *See, e.g.*, Michael R. Sonnenreich & Stanley Ebner, "No-Knock and Nonsense, An Alleged Constitutional Problem," 44 St. John's L.Rev. 626, 643 (1970) (In *Ker* "there was virtual unanimity on one point: the rule of announcement is a constitutional requirement implicit in the fourth amendment proscription against unreasonable searches and seizures"); Blakey, *supra* note 10 at 551 (*Ker* "indicates that the rule of announcement is of constitutional dimension"). *Accord*, Charles Patrick Garcia, Note, "The Knock and Announce Rule: A New Approach to the Destruction-of-Evidence Exception," 93 Colum.L.Rev. 685, 693-94 (1993).

[25] "We therefore hold that in the particular circumstances of this case the officers' method of entry, sanctioned by the law of California, was not unreasonable under the standards of the Fourth Amendment as applied to the States through the Fourteenth Amendment." 374 U.S. at 40-41.

discretionary authority to enter or invade a home, provided they have secured a judicial warrant, or believe an exception to the warrant rule exists to justify an intrusion. Most recently, in *Maryland v. Buie*, 494 U.S. 325 (1990), the Court turned aside an argument that the police should be granted discretion to undertake a protective sweep of a home incident to the arrest of an individual named in an arrest warrant for a violent crime. Rather than granting officers the discretion to conduct a protective sweep, the Court held that such intrusions are constitutional only when there is "a reasonable belief based on specific and articulable facts that the area to be swept harbors an individual posing a danger to those on the arrest scene." *Id.* at 337.

Similarly, in *Arizona v. Mincey*, 437 U.S. 385 (1978), a unanimous Court ruled that police officers must obtain judicial approval before entering a home to investigate a serious offense, even where there is powerful proof that evidence of a crime will be found inside. The fact that the police in *Mincey* were investigating a recent homicide did not alter the constitutional protection afforded the home. Like the situation at hand when the police are looking for narcotics in a private residence, the "seriousness of the offense under investigation" neither diminishes the privacy that surrounds the home, nor justifies relaxing the constitutional constraints imposed on officers who invade an individual's home. *Id.* at 394. *See also Thompson v. Louisiana*, 469 U.S. 17 (1984)(*per curiam*).

The importance of checking police discretion when entering a home was again emphasized in *Payton v. New York*, 445 U.S. 573. There officers had unquestioned probable cause to arrest, and sought to effectuate those arrests inside of the homes of the defendants. This Court ruled that, absent exigent circumstances, the Fourth Amendment required that a judicial warrant be obtained before police breach the entrance of an individual's home. 445 U.S. at 589. The

reasoning of *Payton* was reaffirmed in *Welsh v. Wisconsin*, 466 U.S. 740 (1984). In *Welsh*, the defendant's car was found abandoned on the side of a road, and an officer had probable cause to believe that Welsh had recently retreated to his house. The *Welsh* Court also *assumed* that without an immediate entry of the defendant's home the police would be unable to preserve the evidence of the defendant's blood-alcohol level. *Id.* at 754. Despite this exigency, the Court concluded that the warrantless, night entry was unconstitutional where the police sought only to arrest for a nonjailable traffic offense. *Id.*

These cases illustrate an important principle that was not grasped by the decision below. That is, when the privacy of one's home is at stake, the obtaining of a judicial warrant, or the existence of exigent circumstances to intrude, does not exhaust constitutional scrutiny of the actions taken by the police when executing their authority to search and seize.[26] A police entry into a home -- even an entry authorized by a judicial warrant or a recognized exception -- must still pass constitutional muster under the Fourth Amendment's Reasonableness Clause. Heretofore, absent

---

[26] *Cf. Arizona v. Hicks*, 480 U.S. 321 (1987)(lawful police entry into a home due to exigency does not authorize search of an object that lacks probable cause to be associated with criminal conduct). Although it did not involve an intrusion of a home, the reasoning of *Ybarra v. Illinois*, 444 U.S. 85 (1979), also demonstrates the Court's teachings that the possession of a search warrant does not release police officers from constitutional restraints when they seek to execute that warrant. In *Ybarra*, the police had a warrant to search a tavern and bartender. Once inside, the police frisked patrons of the bar. This Court ruled that the search warrant provided no authority to frisk the tavern's patrons. Those searches were permissible only if the police had individualized, reasonable suspicion that the persons searched were armed and presently dangerous. *Id.* at 91-94.

exigent circumstances, routine intrusions into the home have withstood constitutional scrutiny where the police identify themselves and announce their purpose. The decision below is remarkable in that it offers no reasons for abandoning a constitutional safeguard that has been approved by Congress,[27] recognized by many lower federal and state courts,[28] codified in the statutes of thirty-one states and the District of Columbia,[29] and described by this Court as a right that is "deeply rooted in our heritage" and "embedded in Anglo-American law." *Miller v. United States*, 357 U.S. 301, 313 (1958). Indeed, the respect and legal standing of the announcement rule is recognized by the State of Arkansas itself. Arkansas law enforcement officers must give notice of their office and purpose as a prerequisite to a forcible entry into a home to make an arrest.[30]

---

[27] 18 U.S.C. §3109 controls the authority of federal officers to execute a search warrant. It provides:

> The officer may break open any outer or inner door or window of a house, or any part of a house, or anything therein, to execute a search warrant, if, after notice of his authority and purpose, he is refused admittance or when necessary to liberate himself or a person aiding him in the execution of the warrant.

[28] *See* list of rulings in Appendix A.

[29] *See* list of statutes in Appendix B.

[30] *See* Ark. Code Ann. §16-81-107 (c). This provision states: "To make an arrest, an officer may break open the door of a house in which the defendant may be, after having demanded admittance and explained the purpose for which admittance is desired."

III. UNDER THE FOURTH AMENDMENT'S REASONABLENESS CLAUSE, THIS COURT HAS EVALUATED THE MANNER OR METHOD OF HOW A SEARCH AND SEIZURE IS EXECUTED

As noted above, this Court's holdings make clear that the existence of a judicial warrant or a recognized exception to the warrant requirement does not grant officers unchecked discretion to decide how to execute a search or seizure within a home. The concept of reasonableness, which is at the core of the Fourth Amendment's text, mandates that the Court also evaluate the manner in which a search or seizure is conducted. This maxim of Fourth Amendment doctrine is applicable even where the police believe that their conduct is justified to secure the arrest of a wanted suspect, or necessary to prevent the destruction or removal of evidence of crime.

Tennessee v. Garner, 471 U.S. 1, is just one of several cases to reiterate this principle. In *Garner*, having probable cause to make an arrest, a police officer utilized deadly force to prevent the immediate escape of a burglary suspect. State officials argued that if probable cause exists to make an arrest, the Fourth Amendment has nothing to say about *how* that arrest is executed. *Id.* at 7. This Court rejected that argument and explained that the Fourth Amendment's requirement of reasonable seizures "depends on not only when a seizure is made, but also how it is carried out." *Id.* at 8. Consistent with this principle, probable cause to arrest does not authorize an officer to use deadly force unless a suspect "poses a threat of serious physical harm, either to the officer or to others." *Id.* at 11.

Similarly, in *Maryland v. Garrison*, 480 U.S. 79, police obtained a warrant that was supported by probable cause to search the person and apartment of Lawrence McWebb.

When the police applied for the warrant and arrived at the building to execute the warrant, they believed that there was only one apartment on the premises described in the warrant. In fact, the described premises contained two apartments, one occupied by McWebb and one by Garrison. Incriminating evidence was discovered in Garrison's apartment before the police realized that a mistake had been made. *Id.* at 81.

In determining whether the search of Garrison's apartment was constitutional, this Court did not simply ask whether officers had a valid search warrant that was supported by probable cause. The Fourth Amendment required resolution of an additional issue. The Court also had to evaluate the "reasonableness of the manner in which [the search warrant] was executed." *Id.* at 84. If the reasoning of the court below had been constitutionally correct, there would have been no need to consider the reasonableness of the manner of the police intrusion in *Garrison*.

The reasoning and result in *Chimel v. California*, 395 U.S. 752, also recognize the principle that lawful authority to be inside a home does not grant officers *carte blanche* discretion in executing their mission. In *Chimel*, officers were lawfully inside the defendant's home to arrest him. After securing the arrest, officers "then looked through the entire three-bedroom house, including the attic, the garage, and a small workshop." *Id.* at 754. No search warrant authorized this search. The search was defended as justifiable, *inter alia*, because the police had probable cause to believe evidence of crime would be found and, without an immediate search, the evidence might be removed or destroyed.

The *Chimel* Court ruled that the search exceeded the proper bounds of a constitutional search incident to a lawful arrest. When confronted with the claim that it was reasonable to search a man's house when he is arrested in it, this

Court noted that such a claim was not supported by "considerations relevant to Fourth Amendment interests." *Id.* at 765. By this, the Court meant that police invasions of a home cannot be "founded on little more than a subjective view regarding the acceptability of certain sorts of police conduct." *Id.* at 764-65. Moreover, the existence of lawful authority to arrest Chimel did not justify an additional intrusion of his privacy and personal security. *Id.* at 767, n.12.[31]

When the principles of the above cases are recalled, it is clear that the ruling below did not apply the correct Fourth Amendment analysis to evaluate the police conduct that occurred at petitioner's home. The Arkansas Supreme Court apparently believed that the existence of a valid search warrant exhausted the constitutional considerations regarding the entry into petitioner's home. The court's premise was wrong for two reasons.

First, it is no longer subject to challenge that *all* searches and seizures -- even ones authorized by a warrant or a recognized exception to the warrant rule -- must ultimately be judged reasonable in order to pass constitutional muster.[32] Second, this Court's prior rulings establish that the reasonableness of a particular search or seizure "depends on not only when a[n intrusion] is made, but also how it is carried out." *Garner*, 471 U.S. at 8. This second constitutional requirement is extremely pertinent when evaluating invasions of an individual's home. In no other place "is the zone of privacy more clearly defined than when bounded by the unambiguous physical dimensions of an individual's home -- a zone that finds its roots in clear and specific constitutional terms." *Payton*, 445 U.S. at 589.[33] Both of these constitutional commands were ignored by the court below.

The ruling below does not discuss whether the police entry satisfied the standards of reasonableness required by the Fourth Amendment. There is no explanation why this unannounced, forcible, and evening entry was necessary to serve law enforcement interests. All this Court has is the unadorned statement that "[t]here is no authority for [petitioner's] theory that the knock and announce principle is required by the Fourth Amendment." J.A. 77. If the decision below is not overruled by this court, Arkansas law enforcement officials (and countless other state officials who may choose to follow Arkansas' procedure) will be free to break down the doors of a private home -- unannounced and with-

---

[31] *See also Buie*, 494 U.S. at 336 (noting that the protective sweep authorized by that case did not depend on the discretion of the police, "but may be conducted only when justified by a reasonable, articulable suspicion that the house is harboring a person posing a danger to those on the arrest scene").

[32] *See, e.g., Maryland v. Buie*, 494 U.S. 325; *Maryland v. Garrison*, 480 U.S. 79; *Ker v. California*, 374 U.S. 23 (1963).

[33] Nothing in *Dalia v. United States*, 441 U.S. 238 (1979), was meant to undermine this rule. There, the defendant argued that a judicial warrant authorizing the installation of electronic surveillance equipment for an office also had to specify that entry would be by covert means. *Dalia* rejected this argument and noted that "it is generally left to the discretion of the executing officers" how to execute a warrant, "subject of course to the general Fourth Amendment protection 'against unreasonable searches and seizures.'" *Id.* at 257. Even if a forcible or unannounced entry was anticipated, *Dalia* merely ruled that a judge was not required to outline "precisely the procedures to be followed by the executing officers." *Id.* at 258. But even the government in *Dalia* conceded "that the manner in which a warrant is executed is subject to later judicial review as to its reasonableness." *Id.* (citation and footnote omitted).

out cause -- whenever they possess a search warrant or think they have grounds satisfying a recognized exception to the warrant requirement.

No precedent of this Court sanctions such broad discretionary powers for police officers. Indeed, when this Court outlined the legal requirements for administrative inspection programs -- which involved official conduct *substantially less* intrusive than the entry of petitioner's home -- the Court made clear that a homeowner has important constitutional interests in being notified of an inspector's presence and the lawful limits of an inspector's authority.[34] Like the administrative inspection program this Court invalidated seventeen years ago, the decision below "leave[s] the occupant subject to the discretion of the official in the field," *Camara*, 387 U.S. at 532, to decide whether the doors of a private home will be broken down without announcement.

---

[34] *See Camara v. Municipal Court*, 387 U.S. at 532 ("Under the [challenged] system, when the inspector demands entry, the occupant has no way of knowing whether enforcement of the municipal code involved requires inspection of his premises, no way of knowing the lawful limits of the inspector's power to search, and no way of knowing whether the inspector himself is acting under proper authorization"). *Cf. Michigan v. Clifford*, 464 U.S. 287, 303 (1984)(Stevens, J., concurring in judgment)(emphasizing the constitutional importance of "advance notice" to a homeowner before fire investigators are permitted to a enter a home); *Michigan v. Tyler*, 436 U.S. 499, 514 (1978)(Stevens, J., concurring in part and concurring in judgment)("[T]o comply with the constitutional requirement of reasonableness, I believe the sovereign must provide fair notice of an inspection")(footnote omitted).

IV. THE ANNOUNCEMENT RULE PROMOTES THE PRIVACY AND SECURITY INTERESTS OF A HOMEOWNER, INTERESTS WHICH HAVE BEEN RECOGNIZED BY THE COURT'S FOURTH AMENDMENT CASES

The court below found no constitutional authority for the announcement rule. Implicit in this conclusion is the view that announcement serves no legitimate Fourth Amendment interests. This assessment of the constitutional interests protected by the rule is mistaken.

As Professor LaFave has acknowledged, "[t]he constitutional requirement of announcement serves a number of most worthwhile purposes."[35] These include protecting the homeowner's privacy, *Miller v. United States*, 357 U.S. at 313, and decreasing the likelihood of violence when officers enter a home unannounced, both to those inside the home and to police officers "who might be mistaken, upon an unannounced intrusion into a home, for someone with no right to be there." *Sabbath v. United States*, 391 U.S. 585, 589 (1968). The announcement rule also may reduce the physical destruction of property by giving a homeowner the opportunity to admit the police into the home, and permits "a resident to clarify the purpose of the police intrusion, to demand identification from the officers, or to indicate either that the resident or the premises are mistakenly described in the warrant."[36] Without discrediting most of these constitutional interests, some commentators and courts have questioned whether the announcement rule promotes legitimate

---

[35] 2 Wayne R. LaFave, SEARCH AND SEIZURE §4.8(a) at 272 (2d ed. 1987); *see also* Note, *supra* note 21 at 140-42.

[36] Charles Patrick Garcia, Note, *supra* note 24 at 691 (footnote omitted). *See also Camara*, 387 U.S. at 532.

privacy concerns.[37] These criticisms impose an unduly narrow view of the protective shield that the Fourth Amendment places around the home.

This Court generally determines the intrusiveness of police conduct from the perspective of the innocent person. *Florida v. Bostick*, 501 U.S. 429, 438 (1991). By this measure, the announcement requirement undoubtedly serves legitimate Fourth Amendment interests. Critics who claim otherwise ignore the reality of unannounced, forcible police raids.

For example, it was once suggested that the announcement rule advances no legitimate constitutional interest and "benefit[s] the guilty alone."[38] This claim is neither supported by prudent judgment, nor factually accurate. First, on the matter of judgment, over twenty years ago the United States Congress endorsed the view stated by Senator Sam Ervin that "the announcement rule was established to protect the privacy of the home." 120 Cong. Rec. 22884 (July 11, 1974).[39] After previously authorizing federal narcotics officers and District of Columbia police officers to undertake "no knock" search warrants, in 1974 Congress repealed those laws.[40] In revoking the "no knock" authority of federal officers, many members of Congress undoubtedly shared Senator Jacob Javits' conclusion that "the marginal utility of the no-knock provisions is far outweighed by the grave dangers which they pose to the fundamental and constitutionally guaranteed right to privacy." *Id.* at 22886.

Critics of the announcement requirement are also wrong when they assert that this constitutional safeguard only aids guilty persons intent on destroying evidence. Prominent members of the Senate spoke against this narrow conception of the announcement rule. Senator Javits noted that "government agents have abused the no-knock authority to break into the homes of and terrorize unsuspecting and even inno-

---

[37] *See* Sonnenreich & Ebner, *supra* note 24 at 647 ("It is difficult to see, however, what actual protection is given to any right of privacy by the announcement rule"); Blakey, *supra* note 10 at 557 ("[T]he real issue in the announcement situation is solely the traditional question of force. Bringing in the amorphous concept of privacy merely confuses the problem").

[38] *State v. Smith*, 181 A.2d 761, 770-71 (N.J. 1962).

[39] In urging his colleagues to repeal federal laws authorizing unannounced searches, then-Senator Lloyd Bentsen stated:

> . . . I am not prepared to sacrifice the liberties secured by the fourth amendment in order to accomplish th[e] purpose [of fighting illegal drugs]. *I do not believe that the road to better law enforcement lies through kicking down the doors of innocent citizens in the course of unannounced, nocturnal raids.*

(continued...)

[39] (...continued)

> *That is not the answer to America's drug abuse problems.*

120 Cong. Rec. at 22905 (emphasis added).

Similarly, Senator Charles Percy, in stating his opposition to unannounced searches, declared:

> [Previous statutes authorizing unannounced searches] were enacted at a time when legitimate concerns about law and order were allowed to overwhelm the interest in preserving the fundamental rights of individual citizens . . . .
>
> Now is the time for us to reaffirm our faith in the constitutional safeguards that are embodied in the fourth amendment. Now is the time for us to recognize once again that all Governmental power is limited so that even the most landable [sic] of goals cannot be pursued by unconstitutional means.

Id. at 22898.

[40] *See* Charles Patrick Garcia, Note, *supra* note 24 at 703-05 (discussing history of federal "no knock" statutes).

cent individuals." *Id.* Senator Bentsen observed that under statutes permitting unannounced searches, "American citizens have been subjected to searches and seizures that more resemble the tactics of a dictatorial police force rather than those of a Federal law-enforcement force." *Id.* at 22905. And Senator Percy stated: "Mistaken drug raids by Federal officers have unfortunately taken place across the country with an alarming frequency. Narcotics agents have sometimes used police-state tactics in making unannounced and unlawful entries into dwellings of decent, law-abiding citizens." *Id.* at 22898.

The invasion of privacy inherent in unannounced intrusions identified by the Senate twenty years ago remain a part of America's current law enforcement landscape.[41] Don Carlson, an executive of a Fortune 500 company, described to a CBS reporter how federal agents entered his home unannounced to execute a narcotics search warrant while he was asleep on the evening of August 25, 1992.

> MR. CARLSON: I stood at the extreme end of that hallway and hollered as loud as I could, "Who's there?"
>
> SAFER: Who did you think was out there?
>
> MR. CARLSON: I thought they were robbers, burglars. I thought my life was in danger.
>
> SAFER: And still no identification.
>
> MR. CARLSON: Nobody ever communicated with me that evening, period.
>
> SAFER (*Voiceover*): Carlson panicked, tried dialing 911, then went for his handgun, returned to the hall and a bomb went off, something police call a "distraction device."
>
> MR. CARLSON: And I fired twice at the front door.
>
> SAFER: Then what?
>
> MR. CARLSON: And then, I'm almost immediately -- I'm hit in this leg and I return . . .
>
> SAFER (*Voiceover*): He staggered back to his bedroom, dropped his gun and collapsed. Twice more he was shot. As he lay bleeding on the floor, Carlson was handcuffed and shackled.
>
> MR. CARLSON: I thought I was in the middle of the worst nightmare I had ever experienced, and -- and -- and I do remember wondering what the hell this was. I did not know. I mean, I couldn't fathom it.[42]

Even critics of the announcement rule are forced to concede that unannounced entries *do* jeopardize the privacy interests of citizens.[43]

---

[41] *See* Charles Patrick Garcia, Note, *supra* note 24 (listing and describing incidents where individuals and families have been subjected to unannounced police entries); James Bovard, LOST RIGHTS 234-39 (1994) (same).

[42] CBS News, *60 Minutes*, Vol. XXV, No. 27 at 6-7 (Mar. 28, 1993). No drugs were found in Don Carlson's home. *See* Bovard, *supra* note 41 at 236-37.

[43] *See* Sonnenreich & Ebner, *supra* note 24 at 647 (emphasis added):

> If the door is locked, he may be able to *avoid a broken door* by responding to the demand for entry. If he is engaged in very private activities, perhaps of a carnal nature, or is otherwise indisposed, he may have time to *avoid embarrassment* -- but not interruption. Or if he is asleep, he will be spared the possible *shock of awakening to the sight of a stranger in his home* (entry by stealth), or of *awakening to the sound of a breaking door*.

The right at stake in this case is not about a right to destroy evidence. Nor is the constitutional safeguard of announcement a right that helps only those who traffic in illegal narcotics. Instead, the right to announcement before forcible entry into a home is an ancient right that is embodied in the protection the Fourth Amendment affords to all persons. Indeed, it is an essential part of the "overriding respect for the sanctity of the home that has been embedded in our traditions since the origins of the Republic." *Payton*, 445 U.S. at 601. Put simply, this case concerns whether officers shall have the authority to decide for themselves -- free of constitutional restraints -- when the doors of a citizen's home shall be broken down without notice. The cases discussed above indicate that this Court has repeatedly refused to grant police officers the broad discretion to invade a private home that was approved by the court below.

This Case Should Not Be Used To Determine The Type and Scope Of Exceptions To The Announcement Requirement

While the petitioner has conceded that there are exceptions to the constitutional requirement of announcement, Pet. Cert. at 12-13, we believe that this case should not be used as a vehicle to define the types and scope of exceptions to the announcement rule. The Arkansas Supreme Court chose not to discuss this matter; that court only determined that the announcement rule was not compelled by the Fourth Amendment. In analogous contexts, this Court has observed that existence *vel non* of exigent circumstances to enter a home depends upon the facts of a particular case. *Minnesota v. Olson*, 495 U.S. 91, 100-01 (1990); *Warden v. Hayden*, 387 U.S. 294, 298-300 (1967). More importantly, the record below provides no evidence that the officers who entered petitioner's home had a reasonable basis for believing, or even asserted a claim, that an exigency existed to justify

an immediate entry.[44] In this posture, petitioner's case should not be utilized to decide what exceptions are permitted to the constitutional requirement of announcement.

---

[44] Should this Court, however, choose to discuss an exigent circumstance exception to the announcement rule, exigency must be measured by the specific facts confronting police officers in a particular case. An automatic or blanket rule that permits unannounced entry whenever drugs are the object of a search lacks the support of this Court's precedents. *Buie*, 494 U.S. at 336 (rejecting automatic rules, holding a protective sweep permissible only where there is reasonable, articulable suspicion that a home contains a person posing a danger to arresting officers); *Mincey*, 437 U.S. at 392-95 (rejecting claim that every homicide investigation "presents an emergency situation demanding immediate [search]"), *Terry v. Ohio*, 392 U.S. 1 (1968)(rejecting claim authorizing frisk for weapons in every street encounter).

Moreover, the blanket drug exception adopted by a few courts is not supported by either the plurality or dissenting opinions in *Ker*, *see* LaFave, *supra* note 35 at 281, and defies the "central teaching of this Court's Fourth Amendment jurisprudence" -- which is -- "a demand for specificity in the information upon which police action is predicated." *Terry*, 392 U.S. at 21, n.18.

As Justice Traynor has recognized:

> Under the Fourth Amendment, a specific showing must always be made to justify any kind of police action tending to disturb the security of the people in their homes. Unannounced forcible entry is in itself a serious disturbance of that security and cannot be justified on a blanket basis. Otherwise the constitutional test of reasonableness would turn only on practical expediency, and the amendment's primary safeguard -- the requirement of particularity -- would be lost. Just as the police must have sufficiently particular reason to enter at all, so must they have some particular reason to enter in the manner chosen.

People v. Gastelo, 432 P.2d 706, 708 (1967).

CONCLUSION

For the reasons stated above, the judgment of the Arkansas Supreme Court should be reversed.

Respectfully submitted,

Tracey Maclin
(*Counsel of Record*)
Boston University School of Law
765 Commonwealth Avenue
Boston, Massachusetts 02215
(617) 353-4688

Steven R. Shapiro
American Civil Liberties Union
Foundation
132 West 43 Street
New York, New York 10036
(212) 944-9800

Ephraim Margolin
240 Stockton Street
San Francisco, California 94108
(415) 421-4347

Dated: January 11, 1995

APPENDICES

BEST AVAILABLE COPY

APPENDIX A

The following is a list of lower federal court and state court rulings that have adopted the announcement requirement either as a matter of constitutional law or as a matter of common law:

Federal Cases

Rivera v. U.S., 928 F.2d 592 (2d Cir. 1991)

Hall v. Shipley, 932 F.2d 1147 (6th Cir. 1991)

U.S. v. Buckley, 4 F.3d 552 (7th Cir. 1993), *cert. denied*, 62 U.S.L.W. 3552 (Feb. 22, 1994)(No. 93-7062)

U.S. v. Moore, 956 F.2d 843 (8th Cir. 1992)

State Cases

People v. Jacobs, 729 P.2d 757 (Cal.1987)

State v. Anonymous, 308 A.2d 251 (Conn. 1973)

Tatman v. State, 320 A.2d 750 (Del. 1974)

State v. Bamber, 630 So.2d 1048 (Fla. 1994)

State v. Davenport, 516 P.2d 65 (Haw. 1973)

State v. Rauch, 586 P.2d 671 (Idaho 1978)

State v. Dusch, 289 N.E.2d 515 (Ind. 1972)

State v. Cohrs, 484 N.W.2d 223 (Iowa App. 1992)

Commonwealth v. Gomes, 556 N.E.2d 100 (Mass. 1990)

People v. Polidori, 476 N.W.2d 482 (Mich.App. 1991), *aff'd*, 479 N.W.2d 636 (Mich.), *cert. denied*, 113 S.Ct. 298 (1992)

State v. Prudhomme, 287 N.W.2d 386 (Minn. 1979)

State v. Pierson, 472 N.W.2d 898 (Neb. 1991)

State v. Matos, 605 A.2d 223 (N.H. 1992)(common law)

State v. Love, 558 A.2d 15 (N.J.Super.A.D. 1989)(common law)

State v Attaway, 870 P.2d 103 (N.M. 1994)

People v. De Lago, 213 N.E.2d 659 (N.Y. 1965), *cert. denied*, 383 U.S. 963 (1966)

State v. Prevette, 259 S.E.2d 595 (N.C.App. 1979), *rev. denied*, 261 S.E.2d 925 (N.C.); *cert. denied*, 447 U.S. 906 (1980)

State v. Sakellson, 379 N.W.2d 779 (N.D. 1985)

State v. Valentine, 598 N.E.2d 82 (Ohio App. 4 Dist. 1991)

Erickson v. State, 597 P.2d 344 (Okla.Crim.App. 1979)

State v. Valentine, 504 P.2d 84 (Or. 1972), *cert. denied*, 412 U.S. 948 (1973)

Commonwealth v. Grubb, 595 A.2d 133 (Pa.Super. 1991)

State v. Carufel, 314 A.2d 144 (R.I. 1974)

State v. Ribe, 876 P.2d 403 (Utah App. 1994)

Wynne v. Commonwealth, 427 S.E.2d 228 (Va.App. 1993)

Heaton v. Commonwealth, 207 S.E.2d 829 (Va. 1974)

State v. Garcia-Hernandez, 837 P.2d 624 (Wash.App.Div. 1992)

Lobatos v. State, 875 P.2d 716 (Wyo. 1994)

APPENDIX B

The following is a list of the states with statutory knock and announce requirements:

Ala. Code §15-5-9 (1992)(search warrant);

Alaska Stat. §12.25.100 (1990)(arrest);

Ariz.Rev.Stat.Ann. §13-3891 (1989)(arrest);
Ariz.Rev.Stat.Ann. §13-3916 (1989)(search warrant);

Ark. Code Ann. §16-81-107 (Michie 1987)(arrest);

Cal. Penal Code §844 (West 1994)(arrest; origins dating to 1872);
Cal. Penal Code §1531 (West 1989)(search warrant; origins dating to 1872);

D.C. Code Ann. §33-565 (1991)(search warrant for controlled substances);

Fla.Stat.Ann. §901.19(1)(West 1985)(arrest; origins dating to 1939);
Fla.Stat.Ann. §933.09 (West 1985)(search warrant; origins dating to 1923);

Ga. Code Ann. §17-5-27 (1990)(search warrant);

Haw.Rev.Stat. §803-11 (1994)(arrest);

Idaho Code §19-611 (1987)(arrest; origins dating to 1864);
Idaho Code §19-4409 (1987)(search warrant; origins dating to 1864);

Ind. Code Ann. §35-33-5-7 (West 1986)(search warrant);

Iowa Code Ann. §808.6 (West 1994)(search warrant; origins dating to 1851);

La. Code Crim.Proc.Ann. art. 224 (West 1991)(arrest; origins dating to 1928);

Mich.Comp. Laws Ann. §764.21 (West 1994)(arrest);
Mich.Comp. Laws Ann. §780.656 (West 1982)(search warrant);

Minn.Stat. §629.34 (1994)(arrest);

Miss. Code Ann. §99-3-11 (1972)(arrest);

Mo.Rev.Stat. §105.240 (1966)(arrest and search warrants; origins dating to 1939);
Mo.Rev.Stat. §544.200 (1987)(arrest);

Nev.Rev.Stat. §171.138 (1967)(arrest);
Nev.Rev.Stat. §179.055 (1967)(search warrant);

N.Y.Crim.Proc. §690.50 (McKinney 1993)(search warrant);

N.C.Gen.Stat. §15A-251 (1988)(search warrant);
N.C.Gen.Stat. §15A-401 (1992)(arrest);

N.D.Cent. Code §29-06-14 (1991)(arrest; origins dating to 1877);
N.D.Cent. Code §29-29-08 (1991)(search warrant; origins dating to 1877);

Ohio Rev. Code Ann. §2935.12 (1993)(arrest and search warrant);

Okla.Stat.Ann. tit. 22, §197 (1992)(arrest; origins dating to 1887);
Okla.Stat.Ann. tit. 22, §1228 (1995)(search warrant);

Or.Rev.Stat. §133.235 (arrest);

Pa.R.Crim.P. Rule 2007 (1989)(search warrant);

S.D. Codified Laws Ann. §23A-35-8 (1988)(search warrant; origins dating to 1877);

Tenn. Code Ann. §40-7-107 (1990)(arrest; origins dating to 1858);
Tex.Crim.Proc. Code Ann. art. 15.25 (West 1977)(arrest);

Utah Code Ann. §77-7-8 (1990)(arrest);

Wash.Rev. Code §10.31.040 (1992)(arrest; origins dating to 1881);

W.Va. Code §62-1A-5 (1992)(search warrant);

Wyo.Stat. §7-7-104 (1987)(search warrant);
Wyo.Stat. §7-8-104 (1987)(arrest; origins dating to 1876).